No. 82-733

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PULLMAN STANDARD, INCORPORATED,

Petitioners,

v.

LOUIS PINKARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly conclude that the district court had clearly erred in rejecting respondent Pinkard's claim that his dismissal was the result of unlawful discrimination?

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PULLMAN STANDARD, INCORPORATED,

Petitioners,

v.

LOUIS PINKARD,

Respondent.

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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The respondent Louis Pinkard, plaintiff in the proceedings below, respectfully urges that this Court deny the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

This case presents a routine and proper application of the requirement of

Rule 52, Federal Rules of Civil Procedure, that an appellate court reverse a factual finding which it finds to be "clearly erroneous." The trial court rejected on the merits eight discrimination claims of the four different plaintiffs.[1/] The court of appeals upheld the rejection of seven of these claims, affirming them on the ground that the lower court decision was not clearly erroneous.[2/] The Eleventh Circuit reversed only a single decision of the trial court, holding that the record compelled the conclusion that Pinkard had been dismissed in retaliation for his efforts to eliminate racial discrimination

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1/ The court rejected the Title VII and section 1981 claims of each of the four named plaintiffs. App. 8a-21a.

2/ App. 73a-74a, 89a-90a.

at Pullman Standard's Birmingham plant.[3/]

Petitioner does not, of course, attack the court of appeals' decision affirming seven of the eight trial court decisions in its favor. Neither does petitioner contend that, in upholding those lower court findings, the Eleventh Circuit applied any improper legal standard. It asserts, however, that the appellate court erred in refusing to uphold as well the rejection of Pinkard's retaliation claim.

It is clear that the court of appeals understood that a trial judge's factual findings must be upheld unless "clearly erroneous." The opinion below referred on six separate occasions to that Rule 52 standard.[4/] The court of appeals quoted

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3/ App. 76a-87a.

4/ App. 75a, 83a, 84a, 85a, 86a (two references).

and expressly relied on this Court's decision in United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948), that

> [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. 5/

The appellate court found to be clearly erroneous both the trial court's ultimate conclusion that Pinkard had been dismissed for legitimate reasons 6/ and the subsidiary findings on which that conclusion was based. 7/

Petitioner contends that certiorari should be granted on the assumption that the court of appeals established and

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5/ App. 86a.

6/ App. 86a.

7/ App. 83a-85a.

applied a very different standard, one permitting appellate courts to engage in "independing fact finding".[8] Petitioner, however, points to no passage in the opinion below announcing or utilizing any such standard. All members of the court of appeals panel were well aware of this Court's decision in Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982),[9] which expressly rejected the proposition that appellate courts could engage in "independent fact finding" as to "ultimate facts". Petitioner's assertion that that erroneous standard was applied here is based solely on the content of a law review article written by Judge Godbold[10] which, in peti-

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8/ Petition, pp. 5, 14.

9/ App. 87a-88a.

10/ Petition, pp. 14-15 note 11.

tioner's view, advocates such an error. Judge Godbold, however, was not a member of the panel which decided this case, and there is nothing in the opinion below to suggest that any member of that panel had ever read the article in question.

The court of appeals' application of the clearly erroneous rule to the particular facts of this case presents no issues warranting review by this Court. This proceeding is not a class action;[11/] only a single black employee will be effected. The plant at which the dispute arose closed in January 1981; thus the only remedy at issue is back pay or other monetary relief, which will have no affect on any other former employee, white or black. There is no

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11/ The court of appeals affirmed the denial of class certification. App. 55a-57a.

question that Pullman Standard's attitude towards Pinkard changed markedly when he was chosen one of the few black union officials at the company's plant. Prior to that time Pinkard had an exemplary disciplinary record; thereafter his supervisors repeatedly objected to his efforts on behalf of his fellow workers.[12/] Following Pinkard's decision to assist the plaintiffs at the trial of the Swint case, company officials allegedly announced their intent to fire him.[13/] As the court of appeals' opinion persuasively demonstrates, the record compels the conclusion that Pinkard's dismissal was in retaliation for these activities.

Petitioner asserts that the decision of the court of appeals presents an issue

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12/ App. 76a-77a.

13/ App. 78a.

of "reverse discrimination",[14] arguing that the majority opinion declares that "the more militant an employee, the more misconduct it takes to fire him."[15] This contention is based on a somewhat fanciful reading of a single passage in that opinion, which states that "the trial court improperly focused on plaintiff's antagonism without counterbalancing the defendant's own antagonism." Petitioner itself expresses some uncertainty as to the significance of this statement.[16] Read in context the quoted language means simply that, in asssessing the motives of the defendant employer, primary attention must

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14/ App. 78a.

15/ Petition 18.

16/ Id.

be paid to evidence of company hostility to Pinkard's civil rights and union activities. The fact that Pinkard believed, correctly or otherwise, that Pullman Standard had engaged in racial discrimination neither justified his dismissal by the company nor provided a basis for rejecting his claim of discrimination.

Petitioner also urges that certiorari be granted to decide whether an employer can be held liable under 42 U.S.C. § 1981 for discharging a black employee in retaliation for his opposition to racial discrimination by that employer. Plaintiffs' Amended Complaint alleged a cause of action under section 1981 for such retaliation,[17/] and both courts below assumed that relation of that kind would be actionable under

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17/ See App. 6a; Amended Complaint, paragraph VIII(i).

section 1981. At no point prior to the filing of its Petition for Writ of Certiorari, however, did the company question this construction. Throughout the proceedings below the company's defense to Pinkard's section 1981 claim was largely factual. The only legal issue raised by petitioner in the court of appeals was an unexplained assertion that the existence of "jurisdiction" over the section 1981 claim was "doubtful".[18/] In its Answer petitioner claimed that no relief could be granted under section 1981 because Pinkard had not exhausted his union grievance procedures,[19/] an argument long ago abandoned. Whether

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18/ Brief for Appellee, No. 79-2890, p. 6.

19/ Answer to Amended Complaint, Ninth Defense.

section 1981 authorizes redress for discriminatory retaliation is not a jurisdictional issue. Thus petitioner's failure to raise that question during the first six years of this litigation precludes it from doing so for the first time in this Court.

Petitioner does not, moreover, dispute Pinkard's right to redress under Title VII for a discriminatory dismissal. The only reason that the court of appeals did not grant such relief under Title VII was that Judge Clark believed that Pinkard's Title VII action was premature because it was filed prior to the issuance of a right-to-sue letter by the EEOC. On Judge Clark's view Pinkard is free to file a fresh Title VII action once a new right-to-sue letter is issued. Thus even if this Court were to hold that an employer may,

consistent with section 1981, fire a black employee who objected to racial discrimination, that would not limit the relief to which Pinkard would ultimately be entitled.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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